No. 83-2143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE,

Petitioner,

v.

HARVEY J. STREET,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals of Tennessee at Knoxville

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the violation of respondent's confrontation rights arising from the introduction of an available, non-testifying accomplice's unredacted confession to the police, which powerfully incriminated respondent, can be excused either because it was ostensibly admitted to rebut respondent's testimony that his own confession was, in part, a coerced "parroting" of the accomplice's or on the ground that the two statements were allegedly "interlocking."

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STATEMENT OF THE CASE

This case involves a (then) seventeen year-old juvenile who was convicted of murder and sentenced to life imprisonment. He was found guilty of having participated in a burglary in which the victim was killed.

On August 27, 1981, the Carter County Sheriff's Office discovered the body of Ben Tester hanging by the neck from a tree in his yard in Hampton, Tennessee. (J.A. 14) His house had been ransacked in an apparent burglary. (J.A. 17) During the investigation of the Tester death, the authorities contacted and questioned Harvey J. ("Joe") Street, a seventeen year-old juvenile, a number of times. (J.A. 188, 269-272)

On September 16, Clifford Peele, an adult, confessed to the burglary and murder. His confession implicated Street as a principal actor in both the burglary and the murder. (J.A. 30-32)

On September 17, 1981, Joe Street signed a confession prepared by Agent Don Collins of the Tennessee Bureau of Investigation (TBI). (J.A. 24, 26-28, 50-58, 64-66) Agent Preston Huckeby of the TBI and Sheriff Papantoniou were present and witnessed the signing of the statement. (J.A. 25) According to the statement (J.A. 353-360), Street and Peele planned to burglarize Tester's house while Tester was away at church. Clifford Peele, Eddie Montgomery, Jeff Causby, and Street went to Tester's house in a stolen truck and ransacked the house. Tester returned unexpectedly but was temporarily subdued by Peele. (J.A. 357)

The statement related that at this point Street ran out of the house and urged Peele several times to flee, but that Peele insisted that they first "string him [Tester] up." Montgomery agreed and threatened to "whip"

Street unless Street helped make a gag for Tester's mouth. Street complied and Peele and Montgomery placed Tester on the truck which Peele backed against a tree. Montgomery attached a rope to a tree limb and Peele placed the looped end of the rope around Tester's neck. Peele and Montgomery lifted Tester off the tailgate and left him hanging.[1] (J.A. 358)

Agent Collins testified that throughout the interrogation, Street was distraught and he cried at times. (J.A. 24) The next day, Street recanted his confession, claiming that he had been subjected to threats alternated with promises of leniency. *State* v. *Street*, 674 S.W.2d 741, 743 (Tenn. Crim. App. 1984).

At trial, Street relied on an alibi defense. In support of this defense, thirteen witnesses testified regarding his whereabouts on the evening of August 27. (J.A. 86-160) Street also testified in support in his alibi defense and repudiated his September 17th confession. He stated that Sheriff Papantoniou had, in addition to threatening and coercing him, forced him to adopt the confession of Clifford Peele. He testified that Sheriff Papantoniou showed him photographs of the deceased and the deceased's residence (J.A. 242, 249), read Peele's confession to him, and instructed him to give a statement which conformed to Peele's. (J.A. 190-94) Street further recounted that he had lied repeatedly in the statement but that whenever

[1] At trial Ray Williams, a carpenter at the Carter County Jail, stated that on or about November 23, 1981, Street told him that he knew where items stolen from Tester's home could be found. (J.A. 86) Bobby Colbaugh, a Judicial Commissioner, testified that he overheard a conversation on June 27, 1982, between Sheriff Papantoniou and Street wherein Street admitted placing the rope around Tester's neck. (J.A. 76) Sheriff Papantoniou corroborated this statement. (J.A. 304-305) Street categorically denied making these two oral statements. (J.A. 204)

he digressed significantly from Peele's version of the crime, the Sheriff would call him a liar and insist that he recite the events consistently with Peele's confession.

The State cross-examined Street extensively and focused upon the particulars given in Street's confession which were absent from Peele's. (J.A. 239-250) Street accounted for these discrepancies by explaining that he had been prompted by the Sheriff to recite certain details, that he related other details after viewing the photographs shown him by the Sheriff, and that he had deliberately lied regarding the rest.

The State then called Sheriff Papantoniou and Agent Huckeby as rebuttal witnesses. The Sheriff stated that, although he had had a copy of Peele's confession and had shown Street Peele's signature on the confession (J.A. 309), he had not forced Street to "parrot" the Peele confession. (J.A. 274-75, 309) The Sheriff's account was corroborated by Agent Huckeby who testified that the Sheriff had not forced Street to imitate Peele's confession.[2] (J.A. 326-27)

In support of his rebuttal testimony, Sheriff Papantoniou also reviewed the two confessions and highlighted the discrepancies between them. Specifically, Street's confession mentioned that: (1) a light was on in Tester's house prior to the burglary; (2) Tester's shirt had been ripped; (3) a nylon rope had been used to hang Tester; (4) a gag had been made from a torn bed sheet; (5) Tester's wallet was located in the front bedroom; (6) money had been taken from Tester's wallet; and (7) shirts had been taken from the residence. Sheriff Papantoniou observed that these details were not to be found in the Peele confession. (J.A. 303-304)

[2] T.B.I. Agent Collins had also testified during the State's case in chief that respondent's confession was not coerced. (J.A. 22-29, 64-66, 74-76)

In addition to the foregoing, the State introduced Peele's statement and allowed Sheriff Papantoniou to read the entire confession to the jury. The defense objected strenuously on the ground that its admission would violate not only the hearsay say, but also Street's right of confrontation. (J.A. 283, 287) The State argued that the confession was admissible because: (1) it was not being offered for the truth of the matter asserted, and therefore did not constitute hearsay; and (2) there was no confrontation violation because Street had "opened the door" to admission of the statement by taking the stand and contesting the validity of his own confession. (J.A. 287-88) The court overruled the objection and instructed the jury to consider Peele's confession only for rebuttal purposes. (J.A. 292-93, 350)

The defense suggested that the damage to Street could be minimized if the Sheriff simply pointed out the differences between the two statements. (J.A. 293) The State agreed and began asking Sheriff Papantoniou about the references in Street's declaration which were absent from Peele's. (J.A. 294) The Sheriff stated that he could not respond without first reading through Peele's confession. The court then permitted him to read the statement but cautioned him: "[R]ead it to yourself, don't read it aloud." (J.A. 294)

The State then reversed its position and informed the court that it intended to have Sheriff Papantoniou read the entire confession to the jury. The court reminded the prosecution of the understanding that the Sheriff was not going to read Peele's whole confession to the jury but, rather, would only highlight the differences between the two statements. (J.A. 294) The State argued that it "would be more coherent" if the Sheriff was allowed to read all of Peele's confession. (J.A. 295) The court permitted the Sheriff to do so over the defense's renewed objection.

The State made no attempt to present Peele as a witness, although Peele was present in the Unicoi County Jail in close proximity to the courthouse. (J.A. 7) Nor was any effort made to redact Peele's confession.

The Tennessee Court of Criminal Appeals reversed the conviction. *State* v. *Street*, 674 S.W.2d 741 (Tenn. Crim. App. 1984). The court noted that although the Peele confession "as used at trial" was not technically considered hearsay in Tennessee, *id.* at 744-45, the admission of the highly incriminating confession of an available accomplice nevertheless violated Street's confrontation rights. The court also held that the confessions were not sufficiently "interlocking" to invoke the interlocking confession doctrine observed under Tennessee law because Peele's confession added significant incriminating matter to Street's confession, such that Street was exposed to a greatly increased risk of conviction. *Id.* at 746. Finally, the court concluded that the error in admitting Peele's confession could not be considered harmless because:

> Peele's statement not only implicated the defendant [Street], it alone established all essential elements of the homicide, had the jury chosen to believe defendant's confessions were in fact involuntary. Defendant is entitled to a new trial free of this constitutional error. *Id.* at 747.

SUMMARY OF ARGUMENT

I. The confrontation clause guarantees an accused the right to cross-examine and otherwise test the veracity of his or her accusers. This constitutional safeguard is more than a mere codification of the local laws of evidence—in particular, the hearsay rule. Generally, to dispense with confrontation of an absent declarant, this Court has required that an incriminating hearsay statement introduced at trial carry adequate indicia of reliabil-

ity and that the speaker be unavailable. Because a confession to the authorities by one who incriminates not only himself but also the defendant is deemed both highly unreliable and extremely prejudicial, the right of confrontation bars its introduction against the defendant where he cannot cross-examine the declarant.

For example, in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), the prosecutor read the incriminating confession of the previously convicted accomplice to the jury under the guise of refreshing the recalcitrant witness's memory. In reversing Douglas's conviction, this Court employed a practical approach noting that even though this reading did not technically constitute testimony, a significant danger existed that the jury would consider the accomplice's confession as substantive evidence.

The inevitable prejudice cannot, moreover, be cured through a limiting jury instruction. In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court again employed a pragmatic analysis in holding the introduction at the joint trial of a non-testifying co-defendant's confession inculpating the defendant violated the defendant's confrontation rights. Even though the confession had not technically been admitted against the defendant—indeed, the jury had expressly been instructed not to consider it as evidence of the defendant's guilt—this Court held that the jury could not be presumed capable of following the limiting instructions in this situation.

In the instant case, the powerfully incriminating confession of Peele, which placed Street at the scene of the crime and assigned him an active role in the murder of Ben Tester, was technically offered only to refute Street's claim that Sheriff Papantoniou had coerced him into imitating Peele's statement. But under *Douglas*, the legal characterization of the purpose underlying introduc-

tion of this type of evidence does not remove confrontation objections, and under *Bruton* the trial court's limiting instructions could not be trusted to keep the jury from using Peele's statement for its truth. The danger of such "spillover" is particularly great where, as here, the impeachment evidence substantively corroborates the State's theory of the case.

The gravity of the confrontation violation was compounded by the fact that it was gratuitous. The State made no effort to call Peele as a witness, although he was housed in a nearby jail. Moreover, there was no effort to redact the significantly incriminating portions from the confession.[3] Nor did the State merely have Sheriff Papantoniou simply highlight the differences between the two statements. Furthermore, Street's version of the circumstances underlying his confession had been directly contradicted by witnesses testifying for the State both in its case in chief and on rebuttal.

II. Contrary to the State's suggestion, Street did not, by taking the stand and repudiating his confession, "open the door" to admission of his alleged accomplice's confession, so as to forfeit his own confrontation rights. *Harris* v. *New York*, 401 U.S. 222 (1971), *Oregon* v. *Hass*, 420 U.S. 714 (1975), and similar decisions cited by the State are aimed—like confrontation itself—at enhancing the integrity of the fact-finding process. In this case, however, the serious challenge to the truth-finding function of criminal trials originated not from Street's testimony but rather from the introduction of the "inevitably suspect" confession of an absent accomplice which implicated Street. *Bruton*, 391 U.S. at 123. The decisions of this Court have never gone so far as to sanction impeach-

[3] As noted by the Tennessee Court of Criminal Appeals, redaction could have been accomplished without detracting from the confession's purported rebuttal purpose. 674 S.W.2d at 745.

ment through evidence as inherently untrustworthy as an accomplice's extra-judicial confession to police. Such a statement is not only inherently unreliable, but it is also immune from traditional adversarial testing.

Furthermore, unlike the situation in cases permitting impeachment by a defendant's own prior inconsistent statements or conduct, tangible evidence, or other declarations containing some guarantee of veracity, the gratuitous introduction of the damning confession of Clifford Peele did not unveil perjury. The existence of some discrepancies between the two confessions simply suggested that they were not perfectly identical: a conclusion not inconsistent with Street's assertions that, in addition to being provided with certain details of the crime by the Sheriff, he also deliberately concocted other portions of his own statement.

III. Years before *Parker* v. *Randolph*, 442 U.S. 62 (1970), in which a plurality of this Court posited, but did not define, an "interlocking confession" exception to the *Bruton* rule, Tennessee had adopted its own version of this doctrine as a matter of state law. Hence, the conclusion of the court below—premised entirely on Tennessee law—that the statements of Peele and Street did not interlock, constitutes an adequate and independent state ground insulating this holding from review.

For the many reasons given by Justices Blackmun, Stevens, Brennan, and Marshall in their opinions in the *Parker* case, it would be imprudent for the Court to adopt an interlocking confession doctrine since such a course would undermine defendants' constitutional rights without producing any corresponding benefit. Indeed, the proposed doctrine would only create the additional risk of promoting confusion and inefficient administration in this area of law.

Moreover, the case for such an exception to *Bruton* is especially weak in the present context. An "interlock" exception clearly is unjustified outside the joint trial situation, where, as the court below observed, the "policy arguments favoring judicial economy and efficiency allow admission against the confessor." 674 S.W.2d at 746. Further, the exception is not only unwarranted but also beyond the contemplation of the *Parker* plurality where a defendant takes the stand, presents a defense and repudiates his confession, thus rendering the accomplice's inculpatory extrajudicial confession as "devastating" and inherently "suspect" as it was in *Bruton*.

Finally, introduction of Peele's confession was not harmless error. Nor did it "interlock" with Street's under any reasonable version of that test. The full statement increased Street's risk of conviction of first degree murder substantially by portraying Street as a much more active and willing participant in the killing than Street's own admissions had. Peele's statement alone established all the requisite elements of the crime had the jury believed that Street's statements were not voluntary. Analysis of this Court's decisions which have found *Bruton* errors harmless reveals that the Court has required significant corroboration of the defendant's participation in the enterprise, or other overwhelming proof of the defendant's guilt, independent of the tainted evidence, such that it appears beyond a reasonable doubt that the constitutional violation had no effect on the jury's decision. The Tennessee Court of Criminal Appeals correctly held that this type of overwhelming evidence was lacking in the instant case.

ARGUMENT

THE STATE VIOLATED RESPONDENT'S RIGHT TO CONFRONTATION WHEN IT INTRODUCED THE ENTIRE TEXT OF AN ALLEGED ACCOMPLICE'S CONFESSION TO LAW ENFORCEMENT AUTHORITIES THAT POWERFULLY INCRIMINATED RESPONDENT, WITHOUT PRODUCING THE DECLARANT WHO WAS JAILED NEARBY; THIS VIOLATION CANNOT BE EXCUSED BY THE FACT THAT THE CONFESSION WAS PURPORTEDLY ADMITTED TO "REBUT" RESPONDENT'S ACCOUNT OF THE EVENTS SURROUNDING THE TAKING OF HIS OWN STATEMENT.

1. The Admission Of The Entire Text Of A Confession That Powerfully Incriminated Respondent, Made To Law Enforcement Officials By An Alleged Accomplice Who Was Not Produced At Respondent's Trial, Although He Was Housed In A Nearby Jail, Violated Respondent's Constitutional Right To Confrontation.

The Tennessee Court of Criminal Appeals held correctly that the admission of Peele's unredacted confession violated Joe Street's confrontation rights. This extrajudicial confession plainly devastated Street's case because it placed him at the scene of the crime, thus directly contradicting his alibi defense. Furthermore, even if the jury accepted Street's confession as voluntary and reliable, Peele's statement damaged Street by portraying him as a more willing and active participant in the murder than his own statements did.

Although Peele's confession was purportedly admitted not for the truth of the matter asserted therein, but merely to rebut Street's claim that he had been coerced into parroting Peele's confession, it provided the State with the strongest evidence corroborative of the prosecution's theory of the case.[4] Nevertheless, the trial court's

[4] No physical evidence was discovered linking Street to the crime. (J.A. 33)

ruling foreclosed Street from testing Peele's recollection, demeanor, perception, and—most importantly—veracity through cross-examination because the State never produced Peele as a witness.

This inability to cross-examine wholly undercuts the primary objective of the right of confrontation:

> [T]o prevent depositions of ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of personal examination and cross-examination.

Mattox v. *United States*, 156 U.S. 237, 242 (1895). The clause affords a defendant the opportunity to face his or her accusers and subject them to cross-examination. It also permits the judge and jury to view the witness's demeanor as an aid to determining the reliability of the testimony. As noted by the *Mattox* Court:

> [T]he accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id.

Although the confrontation clause and the rules against admission of hearsay by and large protect analogous values, the right of confrontation is more than a simple codification of the laws of evidence. *California* v. *Green*, 399 U.S. 149, 155 (1970); *Barber* v. *Page*, 390 U.S. 719, 721 (1968); *State* v. *Jones*, 598 S.W.2d 209, 222 (Tenn. 1980). Although an extrajudicial statement may be admissible pursuant to a local rule of evidence, its use at trial may nevertheless deprive a defendant of his constitutional right to confrontation. *Id.*

Generally, to dispense with confrontation at trial, this Court has required that hearsay evidence introduced in the absence of the declarant bear adequate "indicia of reliability." *See, e.g., Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). Ordinarily, too, the prosecution must show that the speaker is "unavailable" as a witness, at least unless the trustworthiness of the evidence appears unusually great. *Id.* at 65-66; *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972); *cf. Dutton* v. *Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result) (discussing such exceptions to the hearsay rule as business records, "where production would be unduly inconvenient and of small utility to a defendant"). In some recurring instances, however, hard-and-fast rules have developed for determining the constitutionality of admitting such "second-hand" proof at trial. With respect to the facts of this case, *Bruton* v. *United States*, 391 U.S. 123 (1968), provides a governing rule of exclusion—one that the State clearly violated here.[5]

In *Bruton*, the Court held that the extrajudicial confession of a non-testifying co-defendant, Evans, implicating the defendant, Bruton, was inadmissible at their joint trial notwithstanding an instruction to the jury that they should consider the confession only against its maker. The opinion rested on two grounds, both equally applicable to Street.

First, the Court deemed an alleged accomplice's confession inculpating a defendant to be both prejudicial and untrustworthy.

> Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect,

[5] The only purportedly "blanket" exception to the *Bruton* rule, the "interlocking confession" doctrine, which the State claims applies to this case, is discussed *infra* at pp. 34-42.

> a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

391 U.S. at 136.

Second, the Court held that a limiting jury instruction, ordinarily assumed sufficiently protective of the rights of litigants (*see, e.g., Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983)), is an inadequate substitute for cross-examination of the confessing accomplice where the accomplice's incriminating statements are spread before the jury, fairly inviting the jurors to draw improper inferences from the evidence. This situation poses dangers of juror disobedience and resulting harm of a wholly different order than those threatened in the usual case:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instruction is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored [citations omitted]. Such a context is presented here, where the powerfully incriminating extrajudicial confession of a codefendant, who stands accused side-by-side with the defendant are deliberately spread before the jury in a joint trial.

391 U.S. at 135-36.

Here, of course, the jury heard the whole "powerfully incriminating" statement of the absent Peele, and the court's instruction to consider it only for "rebutable [sic] purposes"[6] (J.A. 350) could no more serve to protect

[6] Notably, the instructions given by the trial court were highly streamlined. They were also unilluminating since the judge never explained what he meant by "the purpose of rebuttal." *See, e.g.*, J.A.

Street from its unavoidable use on the substantive issue of guilt than could the limiting charge in *Bruton*. There is, moreover, no relevant distinction between the instant situation and *Bruton* that would allow for a different result in the two cases.

Most critically, contrary to the State's position, the purported non-hearsay use of Peele's incriminating statement did not obviate respondent's sixth amendment objection. *Cf.* Brief for Petitioner at 16-18. The Tennessee Court of Criminal Appeals correctly noted: "[D]efendant's confrontation rights are not foreclosed merely because the confession as admitted did not constitute hearsay." 674 S.W.2d at 745. In the area of confrontation, as in other contexts, this Court has pierced the technical labels and concerned itself with the practical effect of the use of certain extrajudicial statements. For example, in *Douglas* v. *Alabama*, 380 U.S. 415 (1965), as in the instant case, the defendant and his accomplice, Loyd, were tried separately. The State called Loyd to testify at the defendant's trial, but he invoked his privilege against self-incrimination when he was questioned about the incident. The prosecution then, under the pretense of "refreshing" the recalcitrant Loyd's memory, read the confession to the jury and also called various law enforcement officers to the stand who testified that Loyd had authored the confession. Not surprisingly, this Court reversed, holding that although the reading of the confession and witness's refusal to answer did not technically constitute testimony, it might "well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement." *Id.* at 419. Furthermore, Loyd's reliance upon the privilege created the additional danger that the jurors would infer that the statement was true. *Id.*

In the instant case, as in *Douglas*, the circumvention of confrontation was sought to be justified by the fiction that the prosecution was not offering the statement for the truth of the matter asserted. Here too, however, the legal rubric of the non-testifying accomplice's confession ("rebuttal" or "impeachment") did not dispel the prejudice arising from its likely use in fact: to convince the jury of Street's guilt.

Nor did the fact that Street and Peele, unlike Bruton and Evans, were not being tried jointly, excuse the State from its obligation either to produce Peele or forego introducing his confession. Indeed, since an accused on trial such as Evans can never be called by the prosecution, this case presents an even stronger argument than did *Bruton* for disallowing the statement's use.

Moreover, even if one assumes—erroneously—that a straightforward application of *Bruton* does not automat-

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at 292; *see also* J.A. at 293, 350. Although the defense did not object to the instructions below and therefore does not urge their defects as an independent error, their inadequacy only underscores the prejudice resulting from the *Bruton* violation.

Moreover, there is no reason to credit the State's suggestion that the type of limiting instructions involved in this case would have posed *fewer* problems for the jury than those in *Bruton*. Brief for Petitioner at 11; *see also Amicus Curiae* Brief for the United States at 22-23. In fact, the *Bruton* Court suggested in its discussion of *Jackson* v. *Denno*, 378 U.S. 368 (1964), that in so far as one can make generic distinctions, charges requiring jurors to consider proof for one purpose but not another (the situation presented both here and in *Bruton*) call for greater "mental gymnastic[s]" that instructions (such as the one in *Jackson*) which enjoin jurors wholly to ignore a piece of evidence under certain circumstances. *Bruton* v. *United States*, 391 U.S. at 130-31, quoting *People* v. *Aranda*, 63 Cal. 2d 518, 528-29, 47 Cal. Rptr. 353, 407 P.2d 265 (1965). *See generally Jackson* v. *Denno*, 378 U.S. 368 (1964) (under then existing New York procedure, which violated due process, a jury could not be presumed capable of following an instruction to disregard a defendant's confession that they found had been given involuntarily).

ically resolve the matter in Street's favor, general principles of confrontation law clearly do. First, the State did not demonstrate that Clifford Peele was unavailable. Indeed, although Clifford Peele had been transfered to the Unicoi County Jail—in close proximity to the courthouse—during the trial, the State made no attempt to call him as a witness.[7]

Furthermore, Peele's confession bore no indicia of reliability. To the contrary, it was "inevitably suspect," *Bruton*, 391 U.S. at 136, as the statement of an in-custody alleged accomplice.[8]

The gravity of the confrontation violation is compounded by the fact that it was gratuitous. The State made no attempt to secure Peele as a witness. Furthermore, the

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[7] In its *amicus curiae* brief in support of the State, the United States, in a grossly improper excursion beyond the record seeks to justify Peele's absence by reporting that Peele has agreed to testify against Street but that the State declined at the last minute to call Peele as a witness because he "appeared unreliable." *Amicus Curiae* Brief of the United States at 3, n.1. This reference to "facts" outside the record is not only inappropriate and unprofessional (*see* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 13.11, at 716.17 (5th ed. 1978), and authorities cited; *see also* Supreme Court Rule 34.6), but constitutes an improper effort to justify Peele's absence by suggesting he was somehow "unavailable," and that any good faith effort to produce him as a witness would have proven futile. This "justification" finds no support in the Court's precedents. As observed in *Barber* v. *Page*, the prosecution may not simply assume that a witness is "unavailable." Rather, in order for the "unavailability" standard to be met, the prosecutorial authorities must have first made a "good faith effort" to secure the witness' presence. 390 U.S. at 725.

[8] Peele made at least two confessions—one on September 16 and one on September 11, 1981—which varied in the number of parties implicated. (J.A. 32) The September 16 statement was the one read to the jury.

State had handily accomplished its "rebuttal" through vigorous cross-examination of Street and through the direct testimony of Sheriff Papantoniou and Agent Huckeby, who both testified that Street had not been forced to parrot Peele's confession. (J.A. 274-81, 326-28) Indeed, the Sheriff had specifically highlighted the seven discrepancies between the two statements which the State considered to have crucial impeachment value. (J.A. 303-304)

Plainly, reading the entire text of Peele's confession to the jury added little to the impeachment of Street. The discrepancies in the two statements had been amply demonstrated to the jury. Moreover, the fact that the statements lacked complete identity because they varied regarding such details as whether a light was on or whether the deceased's shirt was torn is certainly not dispositive of the parroting issue.[9] A practical examination of the circumstances reveals that the true impeachment value of Peele's confession did not lie in "revealing" these distinctions. Rather the true impeachment value derived from the fact that it rebutted Street's alibi defense by placing him at the scene of the crime and portraying him as a principal actor in the murder.

In sum, this Court's longstanding pronouncements in *Bruton* and *Douglas* plainly barred the admission at trial of the "inevitably suspect" and damning confession of Peele. Neither a limiting instruction nor the purported rationale of "rebuttal" could disguise or obviate the prejudice to Street from the clear violation of his right to confront the witnesses against him.

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[9] Indeed, there are some minutiae contained in Peele's confession that also exist in Street's statement which suggest the contrary proposition: that's the second confession *was* an imitation of the first. For example both declarations specifically volunteer that the deceased's tongue was "not sticking out." (J.A. 302, 358)

II. Respondent Did Not Forfeit His Confrontation Rights By Taking The Stand And Repudiating His Confession.

The State argues that by taking the stand and disputing the voluntariness and reliability of his own confession, respondent Street "opened the door" to the introduction of the confession of his alleged accomplice, Clifford Peele. Brief for Petitioner at 18. The admission, however, of a non-testifying accomplice's confession which powerfully implicated the defendant is precisely the type of practice this Court expressly condemned in *Bruton* and *Douglas*.

The State reaches the remarkable conclusion that Street invited this gross violation of his rights by reasoning that: (1) Street's testimony threatened serious perversion of the truth-seeking function of the criminal trial and (2) his narrative could "only" be disproved by introduction of Peele's confession. Brief for Petitioner at 18-19. Not surprisingly, since both of the State's premises are flawed, its conclusion is equally wrong. In fact, the true threat to the "reliability of the result of the trial" (Brief for Petitioner at 18) derived not from Street's testimony but rather from the use of the "inevitably suspect" in-custody statement of an accomplice who could neither be viewed by the jury nor cross-examined by the defendant. *Bruton* v. *United States*, 391 U.S. 123, 136 (1968). Furthermore, Street's veracity could be, and was, tested by much more reliable—and legitimate—means that Peele's confession, the innate unreliability of which was "intolerably compounded" by the declarant's unaccounted-for absence. *Id.*

The State notes that the ultimate goal of a criminal trial is to ascertain the truth; with that observation, respondent heartily agrees. Yet the critical question is not whether, but how, to achieve that goal in the circumstances presented. The State initially concedes, then

mysteriously proceeds to ignore, the crucial point that confrontation itself advances the aim of reliably assessing guilt or innocence at trial. Brief for Petitioner at 19, quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) and *California* v. *Green*, 399 U.S. 149, 161 (1970). The constitutional right to confront adverse witnesses is a truth-*enhancing* process, which reflects the founders' preference for allowing the finder of fact to gauge the veracity of a defendant's accuser at first hand. As this Court has previouly stated, confrontation

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. *Green*, 399 U.S. at 158.

The assertion that the quest for truth will be assisted by dispensing with the right of confrontation, an inherently truth-enhancing protection, thus defies logic. Predictably, it also defies the precedents of this Court.

The authority relied on by the State[10] stands for the proposition that an accused ordinarily may not take the witness stand and turn a constitutional "shield" into a "sword," or license to commit perjury, confident that he cannot be contradicted. As the State necessarily acknowledges, however, nothing in the Court's pronouncements supports the notion that a testifying defendant, by virtue

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[10] *E.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231 (1980); *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971). Brief for Petitioner at 19-20.

of waiving his privilege against compulsory self-incrimination, also broadly "waives" the right to confront his accusers. Brief for Petitioner at 19. Indeed, some constitutional protections, such as the ban on coerced statements, serve policies so overriding that no use can be made of evidence obtained in violation of the right. *See New Jersey* v. *Portash*, 440 U.S. 450 (1979) (grand jury testimony compelled by grant of immunity); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) (classically involuntary statement by wounded and ill suspect).

But even apart from such blanket exclusions, this Court has consistently limited the operation of the "sword-shield" doctrine to situations where "the trustworthiness of the evidence satisfies legal standards." *Oregon* v. *Hass*, 420 U.S. at 722; *Harris* v. *New York*, 401 U.S. at 224. Peele's confession was, by contrast, the paradigm of an untrustworthy statement.[11] *See generally Bruton* v. *United States*, 391 U.S. at 136. Moreover, none of the cases cited by the State, or their progeny, has ever permitted impeachment by evidence procured in violation of a constitutional safeguard that, like confrontation, by its very nature, directly promotes the reliability of the guilt-or-innocence-determining process. *See Roberts* v.

[11] In the digression beyond the record (*see supra* at p. 17 n.7) wherein the Solicitor General reports that Peele was not called as a witness because the State thought him unreliable, *Amicus Curiae* Brief for the United States at 3 n.1, the Solicitor General fails to clarify the record further by proffering any explanation how Peele's confession could be more reliable than Peele himself. Indeed, since Peele's statement was anything but spontaneous and "may well [have been] motivated by a desire to curry favor with the authorities," (*id.* at 13a n.8, citing Advisory Committee Note to Fed. R. Evid. 804(b)(3)), this omission is scarcely surprising. *Cf. Dutton* v. *Evans*, 400 U.S. at 88 (statement was highly reliable since it has made spontaneously by a declarant who had no motive to lie).

Russell, 392 U.S. 293, 295 (1968) (*Bruton* error results in a "serious flaw" in the fact-finding process at trial).

For example, such cases as *Harris* and *Hass*, which involved statements obtained in violation of *Miranda*, and *Walder* v. *United States*, 347 U.S. 62 (1954), which concerned physical evidence seized in violation of the fourth amendment,[12] dealt—unlike the instant case—with prophylactic exclusionary rules. *See Michigan* v. *Tucker*, 417 U.S. 433, 445 (1974); *New York* v. *Quarles*, ___ U.S. ___, 104 S. Ct. 2626 (1984) (O'Connor, J., concurring). The "shields" provided by the doctrines of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and *Mapp* v. *Ohio*, 364 U.S. 643 (1961), notably do not enhance, and in fact are frequently hostile to, the quest for truth. Furthermore, since these protections have been laid down primarily to deter official misconduct, they ordinarily achieve their purpose once the evidence has been excluded from the prosecution's case in chief. *Oregon* v. *Hass*, 420 U.S. at 721; *Harris* v. *New York*, 401 U.S. at 225. Here, however, exclusion of Peele's confession solely from the prosecution's direct case could not satisfy completely the underlying policies of the confrontation clause because the rationale for barring such statements rest not on extraneous factors like police deterrence but rather on the central concern of the trial process: the reliable assessment of guilt or innocence.

[12] *Harris* and *Hass* permitted a testifying defendant to be impeached with his prior inconsistent statements obtained in the absence of compliance with *Miranda*. Similarly, the Court in *Walder* held that illegally seized narcotics, though not admissible in the State's initial case, could be used to impeach a defendant who perjuriously claimed that he had never before sold drugs. *See also United States* v. *Havens*, 446 U.S. 620 (1980) (the prosecution could properly cross-examine a witness regarding illegally seized evidence of a T-shirt, altered to facilitate drug smuggling).

Cases like *Harris* and *Hass*, in addition, involved impeachment by a defendant's *own* inconsistent statements. Not only did the internal inconsistency afford the strongest possible proof that the accused had lied, either on the stand or prior to trial, but also—having himself made the previous voluntary utterances—he alone was responsible, and hence in a poor position to complain, if they were in fact untrustworthy. *See also United States* v. *Kahan*, 415 U.S. 241 (1974); *cf. Fletcher* v. *Weir*, 455 U.S. 603 (1982) (the defendant's post-arrest silence was, in the absence of *Miranda* warnings, admissible to impeach his self-defense testimony); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980) (same, as to pre-arrest silence).

Simply put, under the pretext of advancing the search for truth, the state unconvincingly seeks to justify the introduction of a shoddy, inherently suspect document, whose author's credibility was never tested at trial, or indeed in any forum. *Cf. California* v. *Green*, 399 U.S. 149, 166 (1970) (credibility tested at prior preliminary hearing); *Mancusi* v. *Stubbs*, 408 U.S. 204 (1982) (veracity examined at prior trial). Equally unpersuasively, the state defends the reception of the absent Peele's entire statement by arguing that only this course of action could have disproved Street's account of the circumstance surrounding the making of his own confession. The record, however, undeniably refutes that contention.

First, the prosecution assailed the credibility of Street's claim through the testimony of Agent Collins, given during the case in chief. (J.A. 22-29, 64-66, 74-76) Second, Street's assertions were directly contradicted by Sheriff Papantoniou, who testified on rebuttal that he had not forced Street to parrot the alleged accomplice's confession. (J.A. 274-281) Third, Agent Huckeby corroborated the Sherrif's version of what had occurred. (J.A.

326-28) Thus, the State was hardly faced with a situation where the accused could testify without "risk of confrontation" by adverse facts. *Cf. Harris* v. *New York*, 401 U.S. at 226. To the contrary, as previously demonstrated, it was the State that had the improper opportunity to smuggle in a powerfully damaging account of the events underlying the indictment—without subjecting the unreliable author of that tale to confrontation.

It is, of course, understandable that the State preferred to introduce Peele's confession through a sheriff instead of an accused felon. No doubt Sheriff Papantoniou was a better and more credible witness than Peele. Nevertheless, the confrontation clause does not sanction such use of *ex parte* statements in lieu of direct testimony simply because this mode of proceeding proves convenient.

The State seeks to excuse its failure to call the declarant on the ground that "cross-examination of Peele would have shed no light on the issue raised by respondent" regarding the making of the latter's confession. Brief for Petitioner at 18. This argument is wholly beside the point. The *illegitimate* prejudice to Street posed by admitting Peele's confession arose not from its claimed tendency to contradict the "parroting" account but rather from its inevitable substantive "spillover" effect, which could not be cured by any limiting instructions. In other words, the injury to Street derived from Peele's version of the crime itself, starkly laid before the jury without possibility of confrontation. *See generally Bruton* v. *United States*, 391 U.S. 123 (1968).

To be sure, Street's prosecutors were not obliged to call Peele if, for whatever reason, they did not wish to do so. But unless they chose to put Peele on the witness stand in person, *Bruton* and *Douglas* barred them from introduc-

ing his confession accusing Street. The fact that they could not "have their cake and eat it too" provides them with no justifiable basis for complaint. The choice they confronted was, after all, constitutionally imposed.

The United States suggests that Street should have called Peele to examine him about his inculpating statement. *Amicus Curiae* Brief of the United States at 23-24. This approach is wide of the mark. First it presupposes an extraordinary shift to the accused of the State's obligations under the confrontation clause. *See, e.g., Barber* v. *Page*, 390 U.S. 719, 725 (1968) (prosecution must make good faith effort to secure declarant's presence). Indeed, it is reminiscent of a time when prosecutors would confront defendants with incriminating hearsay declarations, usually in the form of "depositions, confessions of accomplices, letters and the like," and then challenge the accused to prove that the statements were false. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883) (emphasis added).

Further, the Solicitor General's suggestion is utterly disingenuous in light of his own extra-record representation that the State expected Peele, if subpoenaed, to assert his privilege against compelled self-incrimination. *Amicus Curiae* Brief for the United States at 3 n.1. No reason exists to believe that Peele's testimony would have been any more "available," as a practical matter, to Street than to the State. *Cf. Dutton* v. *Evans*, 400 U.S. at 88 n.19. However, to the extent the issue of Peele's unwillingness to take the stand remained in doubt, the State could not excuse its failure to produce the witness by assuming, rather than ascertaining, that he would claim the protection of the privilege. *Barber* v. *Page*, 390 U.S. 719, 724-25 (1968); *United States* v. *Inadi*, 36 Crim. L. Rep. (BNA) 2158 (3d Cir. November 13, 1984). *Cf. Parker* v. *Randolph*, 442 U.S. 62, 87 (Stevens, J., dissenting) (in most cases, the prosecution would be hard pressed to make a showing of legal unavailability in light of its ability to grant the accomplice-declarant immunity). In any event, even the proven unavailability of Peele as a witness would not have permitted the State to introduce his confession since the mandate of *Bruton* applies notwithstanding the fact that the State can never call the confessing co-defendant to the stand. *Cf. Nelson* v. *O'Neil*, 402 U.S. 622 (1971) (*Bruton* poses no problem when the confessing co-defendant chooses to testify at the joint trial).

At the very least, the State could have minimized the damage to Street by foregoing the use of the entire confession. As the Tennessee Court of Criminal Appeals expressly noted, redaction would have sufficed to permit the State to show, if it could, that Peele's confession differed in relevant ways from Street's and therefore, arguably, supported its contention that Street could not merely have "parroted" the words of Peele.[13] Redaction, of course, is not always an effective method of preserving a defendant's confrontation rights because a juror can usually deduce at a joint trial that "blank" or "Mr. X" refers to the declarant's codefendant. *See Jones* v. *United States*, 342 F.2d 863, 866-67 (D.C. Cir. 1964). Nevertheless, this danger is minimal where, as in the instant case, the declarant is accompanied in the criminal enterprise by a number of other individuals. Indeed, with this many alleged accomplices—none of whom were on trial with Street—, the prosecution could have substituted some-

[13] "Nor was an effort made to limit prejudice to the defendant by redacting incriminating portions of the confession. From an examination of the confession, this could have been done without detracting from the alleged purpose for which the confession was introduced." *State* v. *Street*, 674 S.W.2d 741, 745 (Tenn. Crim. App. 1984).

thing like "another fellow" for all the names and the jury would not have inevitably concluded that any particular reference was to Street.

Moreover, analysis of the declared purpose underlying admission of Peele's confession reveals that redaction of the portions of the statement which seriously inculpated Street could have been accomplished without frustrating the State's aim. The jury did not need to be enlightened by Peele's detailed declarations regarding Street's alleged role in the crime in order to appreciate that Peele's confession made no reference to whether: (1) a light had been on in Tester's house prior to the burglary; (2) Tester's shirt had been ripped; (3) a nylon rope had been used in the hanging; (4) a gag had been made from a torn bed sheet; (5) Tester's wallet had been located in the front bedroom; (6) money had been taken from Tester's wallet; or (7) shirts had been taken from the residence. (J.A. 303-304)

In fact, the parties began with an understanding that the State would employ the substantial equivalent of redaction: testimony concerning selected portions of the Peele confession. Sheriff Papantoniou was to read Peele's statement to himself and then, through questioning, highlight the differences between it and Street's statement without reading the former to the jury. (J.A. 293-94) The prosecution later reneged, however, deciding that it would be "more coherent" for the Sheriff to read the full confession to the jury. (J.A. 295) Yet, after the witness laid the whole of Peele's statement before the jurors, the prosecution had Sheriff Papantoniou underscore these differences—thereby accomplishing exactly what it could have done without such grave prejudice to Street, simply by observing the original arrangement. (J.A. 303-04) "One cannot help but conclude," as the Tennessee Court of Criminal Appeals stated, "that introduction of this unedited confession was merely a transparent attempt to condemn defendant from another source without allowing the veracity of the source or the confession to be tested by cross-examination." 674 S.W.2d at 745-46.

In sum, the instant case presents a clear *Bruton* violation: introduction of an unredacted confession by an absent alleged accomplice, which gravely incriminated the accused. The State's assertions that Street in effect "waived" his right to confrontation[14] and that only admission of Peele's entire confession at trial could unmask Street's purported lies, find no support in law or in fact.

The "sword-shield" decisions of this Court have never gone so far as to sanction impeachment through evidence as inherently unreliable as a co-conspirator's incriminat-

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[14] The State, in passing, mentions that at one point in its case in chief respondent sought to have Peele's statement received in evidence. Brief for Petitioner at 5; *see also Amicus Curiae* Brief for the United States at 17 n.12. Clearly, Street's unsuccessful attempt did not "open the door" to its later admission as a matter of state law, since the Tennessee Court of Criminal Appeals held for respondent.

Nor as a matter of federal law should that circumstance affect the outcome here. As the Solicitor General concedes, at that stage Street "presumably still expected . . . that Peele would be called as a prosecution witness," *id.*, in which event respondent had nothing to lose by offering the statement himself, for whatever it was worth on the "parroting" defense. For if Peele, as could be anticipated, repeated his incriminating story on the stand, the introduction of the earlier confession would not have prejudiced Street. Naturally, when it became clear that the State wanted to use only Peele's confession, not Peele himself, Street could reasonably decide that the balance of advantage lay in asserting his confrontation rights so as to exclude the devastating statement. *Cf. Nelson* v. *O'Neil*, 402 U.S. 622 (1971); *California* v. *Green*, 399 U.S. 149 (1970) (no confrontation problem exists where prior statement of declarant-witness is admitted at trial).

ing extrajudicial confession to the authorities: a confession immune from traditional adversarial testing. Unlike the cases where a defendant's perjury could be revealed by exposure of his own prior inconsistent statements or conduct, by tangible evidence, or by declarations containing some other guarantee of veracity, here the admission of Peele's confession did not necessarily unveil perjury. At best, the evidence provided the jury with a *possible* alternate version of the events leading up to Street's statement. Indeed, the discrepancies between Street's and Peele's confessions are wholly consistent with Street's assertion that, in addition to being forced to parrot Peele's declarations, he deliberately concocted portions of his own statement. (J.A. 195, 212, 218-221) *See* Brief for Petitioner at 18 n.9.[15]

Moreover, as has been amply demonstrated (*see supra* at pp. 24-28), several other viable methods of attacking Street's testimony would not have entailed so sweeping an incursion on his constitutional right to confront the witnesses against him. Armed with the favorable testimony of three law enforcement officers, the State simply had no need (assuming need could ever provide a justification) to run roughshod over Street.

Accordingly, adoption of the State's argument would not advance the search for truth. Instead, it would penalize this respondent's—and also chill future defendants'—invocation of the right to testify by gratuitously depriving Street, as well as others in his position, of the vital protection of confrontation.

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[15] The fact that Street never contended that the Sheriff "fed" him Peele's whole confession reduced the value to the State of detailing each divergence between the two statements.

III. Respondent's Conviction Cannot Be Upheld Under Either The Doctrines Of "Interlocking Confessions" Or Harmless Error.

The Tennessee Court of Criminal Appeals correctly declined to sustain Street's conviction by applying either the doctrine of "interlocking confessions"[16] or the doctrine of harmless error. The court suggested the doctrine of interlocking confessions applies only to *joint* trials where "policy arguments favoring judicial economy and efficiency allow admission against the confessor." *State* v. *Street*, 674 S.W.2d 741, 746 (1984). In any event, the court held, the statements of Peele and Street did not, as a matter of Tennessee law, "interlock." *Id.* Finally, the court rejected the argument that Street's guilt had been so overwhelmingly proved as to make it clear beyond a reasonable doubt that the *Bruton* violation had had no effect on the verdict, and was therefore harmless. Analysis of the relevant authority amply confirms the conclusions of the court below. As an initial matter, however, this Court lacks jurisdiction to overturn that court's interlocking confession holding since it plainly rests on an adequate and independent state ground.

A. Since The Tennessee Court Of Appeals Relied On Tennessee Law In Finding Peele's And Street's Statements To Be Non-Interlocking, This Court Has No Jurisdiction To Review The Issue.

In the recent opinion of *Michigan* v. *Long*, ___ U.S. ___, 103 S.Ct. 349 (1983), the Court established the governing framework for analyzing claims that a state court decision is based, either in whole or in part, on an adequate and independent state ground. Speaking

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[16] *See Parker* v. *Randolph*, 442 U.S. 62 (1979) (plurality decision). *See infra* at pp. 34-42 for discussion of that doctrine and the difficulty of ascertaining its meaning and its limits.

through Justice O'Connor, the Court reaffirmed its commitment to the basic principle that where such a ground exists, the Court's "jurisdiction fails." 103 S.Ct. at 3474 n.4. The "adequate ground" doctrine does not apply, however, when the state court's holding "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the record." *Id.* at 3476. Thus, in *Long*, where the Michigan court's opinion did not cite "a single state case" to support its holding that the car search in question "was unconstitutional" and its references to the state constitution did not indicate that the decision "rested on grounds . . . *independent* from" that court's "interpretation of federal law," this Court rejected the defendant's jurisdictional argument. *Id.* at 3477-78.

Here, by contrast, in refusing to credit the State's assertion that the interlocking confession doctrine precluded application of *Bruton* to vitiate Street's conviction, the Tennessee Court of Criminal Appeals not only cited but also clearly relied primarily, if not wholly, on Tennessee law.[17] The sole federal case mentioned by the court in this connection (except *Bruton*) was this Court's plurality decision in *Parker* v. *Randolph*, 442 U.S. 62 (1979).

In *Parker*, four members of the Court, with four others in disagreement, for the first time announced an approach to "interlocking confessions" by co-defendants other than the traditional inquiry into harmless error. *Id.* at 72-76.[18]

[17] In his brief to the Tennessee Court of Criminal Appeals, Street alleged a violation of both the sixth amendment and Tennessee Constitution art. 1, sec. 9 (containing, *inter alia*, state equivalent of confrontation clause). Brief for Appellant, *State* v. *Street*, at 5.

[18] The Chief Justice as well as Justice Stewart and White joined Justice Rehnquist's opinion for the plurality on this point. Justices

Cf. Brown v. *United States*, 411 U.S. 223 (1973); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969) (all cases dealing with *Bruton* violations under the "harmless error" rubric). Tennessee, however, like some other jurisdictions, had already adopted its own version of an interlocking confession exception to the *Bruton* rule a number of years before *Parker*, beginning with the case of *O'Neil* v. *State*, 455 S.W.2d 597 (Tenn. Crim. App. 1970). *See State* v. *Elliot*, 524 S.W.2d 473, 477-78 (Tenn. 1975) (citing *inter alia*, *O'Neil*). *See generally Stanbridge* v. *Zelker*, 514 F.2d 45, 49-50 (2d Cir. 1975), *cert. denied*, 423 U.S. 872 (1975); *Metropolis* v. *Turner*, 437 F.2d 207, 208 (10th Cir. 1971); *Rachel* v. *Commonwealth*, 523 S.W.2d 395, 399-400 (Ky. App. 1975) (all recognizing an interlocking exception prior to *Parker*). Indeed, in *Parker*, the Supreme Court of Tennessee had reversed the Court of Criminal Appeals in reliance upon *O'Neil* and its progeny. Appendix to Briefs for Petitioners and Respondents, *Parker* v. *Randolph*, at 227-46.

Significantly, although remarking preliminarily that the State placed heavy reliance on the doctrine "set forth in *Parker* v. *Randolph*," the court below prefaced its substantive discussion of the possible applicability here of the interlocking confession doctrine exception with the qualifying words: "In Tennessee . . ." 674 S.W.2d at 746. The opinion then quoted at some length from the leading Tennessee case on the subject, *State* v. *Elliot*, 524 S.W.2d 473 (Tenn. 1975), analyzing the present facts in terms of *Elliot* and another Tennessee decision, *State* v. *Robinson*, 622 S.W.2d 62 (Tenn. Crim. App. 1980).

Stevens, Brennan and Marshall in dissent, and Justice Blackmun concurring in the result, declined to create a separate doctrine for confessions that "interlock." Justice Powell took no part in the consideration or discussion of the case.

With respect to the issue of interlock, *Elliot* cited only state precedent. Moreover, none of the reported post-*Parker* cases on this subject in Tennessee, including *Robinson*, refer to any federal cases except, occasionally, to *Parker* itself. These references, however, are limited to discussion of the State's contentions or the constitutionality, in general terms, of an interlocking confession exception. Furthermore, no detailed analysis of what types of statements, in particular circumstances, do or do not interlock is based in any way on *Parker*. *See State* v. *Simon*, 635 S.W.2d 498, 504 (Tenn. 1982); *State* v. *Street*, 674 S.W.2d 741, 746 (Tenn. Crim. App. 1984); *State* v. *Burtis*, 664 S.W.2d 305 (Tenn. Crim. App. 1983); *State* v. *Painter*, 614 S.W.2d 86, 89 (Tenn. Crim. App. 1981); *see also State* v. *Robinson*, 622 S.W.2d at 71.

In the language of *Long*, therefore, not only did the Tennessee court's decision not "rest primarily" (or, indeed, at all) on federal law, but also it was in no way "interwoven with the federal law." 103 S.Ct. at 3476. Furthermore, because the interlocking confession doctrine *qualifies* a defendant's rights, the Tennessee case plainly have not been shaped by any perceived compulsion of "federal constitutional considerations." *Id.* at 3474 n.4. Rather, the opinion of the court below rests on independent and adequate state grounds. For that reason alone, this Court must decline to disturb the Tennessee Court of Criminal Appeals's holding that Peele's statement did not so "interlock" with Street's as to bar the application of *Bruton*.

B. The Court Should Decline To Adopt The *Parker* Plurality's Exception To *Bruton* For Interlocking Confessions, Especially Where—As In Street's Case And Not In *Parker*—The Defendant Is Being Tried Alone And Introduces Evidence To Attack His Confession. Instead, The Court Should Continue To Adhere To Traditional Harmless Error Analysis.

In *Parker*, the non-testifying co-defendants had each confessed to their role in the crime. In upholding their convictions, the plurality reasoned that in the situation where there are "interlocking confessions" the co-defendants' incriminating statements will seldom be so "devastating," nor limiting instructions so inadequate, as to call for preclusion under *Bruton*. Writing for the Court, Justice Rehnquist stated that "admission of interlocking confessions with proper limiting instructions conforms to the requirements of the Sixth and Fourteenth Amendments to the United States Constitution." 442 U.S. 73-76, citing *Bruton*. The three dissenters, in an opinion by Justice Stevens, as well as Justice Blackmun, who authored a separate opinion, all departed from the plurality's interlocking confession analysis. Agreeing that the case should be subjected to ordinary "harmless error" scrutiny, they differed only in their conclusions whether any *Bruton* violation had in fact affected the verdict.

Although many of the lower courts have apparently accepted the *Parker* approach,[19] respondent urges that the Court decline to extend majority endorsement to that decision. The exception for interlocking confessions in-

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[19] Some courts have, however, rejected the plurality's reasoning in *Parker*. *See United States* v. *Parker*, 622 F.2d 298 (8th Cir.), *cert. denied sub nom. Ward* v. *United States*, 449 U.S. 851 (1980); *Earhart* v. *State*, 48 Md. App. 695, 429 A.2d 557 (1981); *State* v. *Rodriguez*, 226 Kan. 558, 601 P.2d 686 (1979).

troduces confusion into the law, with a consequent threat to the safeguard embodied in *Bruton*. Furthermore, there is little countervailing benefit since harmless error analysis under cases like *Harrington* v. *California*, 395 U.S. 250 (1969), serves any legitimate purpose sought to be achieved by an interlocking confession exception. In fact, Justices Blackmun, Stevens, Brennan, and Marshall, in their *Parker* opinions have already given all or most of the reasons for refusing to create an idiosyncratic loophole for cases, otherwise clearly governed by *Bruton* and the *Harrington* line, where the defendant himself has made an inculpatory statement.

For one thing, as evidenced by the wide diversity in lower court approaches to the interlocking confession doctrine, there exists very little agreement about the degree to which the admission must "interlock" before *Bruton* is deemed inapplicable. Some courts, for example, have required only that the confessions be "substantially similar" (*United States* v. *Spinks*, 470 F.2d 64, 66 (7th Cir.), *cert. denied*, 409 U.S. 1911 (1972); *see Tamilio* v. *Fogg*, 713 F.2d 18, 20-21 (2d Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 706 (1984)) or do not contradict each other. *See, e.g., Jones* v. *State*, 227 So.2d 326, 328 (Fla. Dist. Ct. App. 1969).

Other courts have limited application of the doctrine to situations in which the co-defendant's confession does not implicate the defendant to any greater extent than his or her own statements. *E.g., Rachel* v. *Commonwealth*, 523 S.W.2d 395, 399-400 (Ky. App. 1975). Indeed, this is the law in Tennessee. *State* v. *Elliot*, 524 S.W.2d 473, 477-78 (Tenn. 1975). Still other courts have required that the confessions "dovetail in all the particulars." *Metropolis* v. *Turner*, 437 F.2d 207, 208 (10th Cir. 1971). The *Parker* plurality, on its own part, "simply assume[d] the interlock" in that case, without determining "what an 'interlock' is." 442 U.S. at 80 (Blackmun, J., concurring in part); *id.* at 82 n.2 (Stevens, J., dissenting).

It perhaps is not surprising, therefore, that the Court when first confronted with the "interlock" situation did not embrace the exception by a majority or seek to define the term "interlocking confessions." Regardless, fashioning a definition in this case would simply risk replacing a vague and uncertain doctrine with law that, while conceivably clearer, would provide a poor substitute for *Bruton*'s protection of defendants' confrontation rights which is as sensibly and traditionally qualified as the harmless error principle. On the one hand, should the Court adopt a weak "similarity" or "substantial consistency" test like the one apparently urged by the State (Brief for Petitioner at 21-22), *Bruton* will be "seriously undercut"—and for no good reason. 442 U.S. at 82-83 (Stevens, J., dissenting). As the *Parker* dissent aptly pointed out, there is no basis for believing that "the jury's ability to disregard a co-defendant's inadmissible and highly prejudicial confession is invariably increased by the existence of a corroborating statement by the defendant." *Id.* at 84. If anything, intuition suggests the very opposite is likely: that jurors will allow the accomplice's confession to infect their determination of a confessing defendant's guilt or innocence because they will regard each set of admissions as reinforcing each other.

Further, although in some circumstances the incriminating statements of a co-defendant will not "be of the 'devastating' character referred to in *Bruton* when the incriminated defendant has admitted his own guilt," in other situations the non-testifying confessor's statement may, indeed, lend " 'substantial, perhaps even critical, weight to the Government's case.' " *Parker* v. *Randolph*, 442 U.S. at 72-73, .quoting *Bruton* v. *United*

States, 391 U.S. at 128. Whatever the exact meaning of "interlock," common sense and experience support the insight that few, if any, interlocking confessions will harmonize wholly. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at trial. In addition, "[a]lthough two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's co-defendant"—as the present set of facts well illustrates. 442 U.S. at 79 (Blackmun, J., concurring). To the extent that this Court permits a co-defendant's similar but not identical confession to be received at a confessing defendant's trial, that defendant will incur the very prejudice the *Bruton* rule was designed to avoid.

On the other hand, if the Court should espouse a strict test of what constitutes interlocking confessions—one that reflects more fully the letter and spirit of *Bruton*—it is far from clear how the interlock issue would relate to the question of harmless error. At best, it appears, the inquiries would merge, thus rendering the interlock standard superfluous. Alternatively, the trial courts would face a two-step determination (first interlock, then harmless error) which would only lend itself to lack of clarity and inefficiency. 442 U.S. at 80-81 (Blackmun, J., concurring). At worst, to avoid such duplication, a judge may simply "throw up his hands" and decide that the statements interlocked where the issue was doubtful. That result would not only curtail seriously the accused's right of confrontation but would also set aside the generally protective approach to constitutional safeguards embodied in *Chapman* v. *California*, 386 U.S. 18 (1967) (to avert reversal, constitutional error must be "harmless beyond a reasonable doubt"), and this Court's other harmless error decisions. *Id. Cf. Harrington* v. *California*, 395 U.S. 250 (1969) (the untainted evidence must be "overwhelming").

In sum, this Court should adhere to the view shared by the dissent (Justices Stevens, Brennan, and Marshall) and Justice Blackmun in *Parker:*

> I would not adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the confrontation clause protects.

442 U.S. at 79 (Blackmun, J., concurring). But regardless of the overall approach the Court opts to follow, it plainly should not adopt an exception to *Bruton* for interlocking confessions in the case of a lone defendant, like Street, who takes the stand in order to repudiate his own admissions.

First, any policy considerations supporting introduction of co-defendants' confessions incriminating other defendants do not apply outside the context of joint trials: the setting in both *Bruton* and *Parker*. As the Tennessee Court of Criminal Appeals noted, considerations of "judicial economy and efficiency" militate in favor of using such confessions where, for these same practical reasons, the State is proceeding against several defendants in one proceeding and each defendant is necessarily "unavailable" for confrontation by the others unless he freely chooses to testify. *State* v. *Street*, 674 S.W.2d 741, 746 (Tenn. Crim. App. 1984).

The instant case involved no joint trial dilemma. Peele was not "unavailable" for purposes of confrontation. Moreover, the prosecution in *Street* had already accomplished what the prosecution in *Parker* was seeking: admission of the confession of the statement-maker *against the statement-maker*. Street's statements had

already been entered into evidence when the prosecution was also allowed to read Peele's entire confession to the jury.

This distinction is critical when reviewing the State's assertion that the jury was not faced with an "overwhelming task" similar to that presented in *Bruton* and *Douglas* regarding the ability to ignore an incriminating confession. Brief for Petitioner at 16. In *Bruton*, *Douglas*, and *Parker* the jury was being asked to apply an extrajudicial confession *against the statement-maker* only. The "mental gymnastic"[20] required of the jury was obedience of the admonition not to apply the accomplice's confession to the defendant. In the instant situation, though, the jury as specifically invited to employ Peele's confession against Street. Indeed, they were asked to first analyze its contents and then gauge Street's credibility. It is submitted that, once the jury is asked to apply the extrajudicial statements against the *non-statement maker*, the ability to "segregate evidence into separate intellectual boxes," *Bruton*, 391 U.S. at 131, is an overwhelming task despite the issuance of cautionary limiting instructions. This is particularly true when there is only one defendant against whom the jury can apply the incriminating confession.

Second, the Court should not broadly embrace the *Parker* plurality decision so that it applies to instances, like the present case, where the defendant introduces evidence repudiating his earlier confession and offers a defense to the charges. Indeed, *Parker* itself does not appear to sanction application of an interlocking con-

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[20] In *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) Judge Learned Hand criticized the proposition that a jury could engage in the "mental gymnastic" of disregarding inadmissible hearsay simply because they are instructed to do so.

fession exception under these circumstances. Justice Rehnquist observed that the right to confront and cross-examine adverse witnesses would likely prove of little value to a person "whose own admission of guilt stands before the jury *unchallenged*." 442 U.S. at 73 (emphasis added). Such a defendant, apparently, is unlikely to suffer the type of "devastation" envisioned by *Bruton* from the introduction of his alleged accomplice's statements. *Id.*

Here, in contrast to the *Parker* defendants, Street took the stand and testified at length to contest the validity of his confession and to assert an alibi defense. Different as it is factually, this case should also be legally distinguished from the situation where the defendant permits his own confession to be spread before the jury without attacking its validity or substance, yet seeks only to protest the admission of his accomplice's incriminating statements.

First, Street challenged the voluntariness and reliability of his confession directly through his own testimony and indirectly through the presentation of thirteen witnesses who corroborated his alibi defense. (J.A. 86-160) Therefore, Street demonstrated a need to cross-examine the absent Peele in an effort to "shake" his accuser's story. Second, Street's repudiation of his own statement reduced Peele's confession to its presumptively "suspect" status since it no longer stood corroborated by the defendant. *Cf. Parker* v. *Randolph*, 442 U.S. at 73. Further, the fact that Street put on an alibi defense, coupled with a broadside attack on his prior admissions, necessarily rendered Peele's confession much more "devastating" than the unchallenged co-defendants' confessions at issue

in *Parker*.[21] As previously observed, Peele's confession served as a substantive rebuttal of Street's alibi defense and constituted significant corroboration of the State's theory of the case.

Accordingly, the Court should decline the State's invitation to "clarify" the interlocking confession doctrine of the *Parker* plurality. Brief for Petitioner at 20. As has been convincingly shown, the adoption of this open-ended exception to the rule of *Bruton* threatens defendants' legitimate rights of confrontation without producing any corresponding benefit, in terms of improving or rationalizing the law in this area or even easing its administration. The Court should, therefore, proceed to analyze the present case under the harmless error rule.

C. The Error In Admitting Peele's Unredacted Confession Was Not Harmless, Nor Did Peele's And Street's Confessions Interlock Sufficiently To Obviate The *Bruton* Error.

The Tennessee Court of Criminal Appeals expressly held that the confrontation violation here did not amount to harmless error. *State* v. *Street*, 674 S.W.2d 741, 747 (Tenn. Crim. App. 1984). Interestingly, the State does not dispute this holding. This Court, moreover, should be loathe to second-guess such primarily factual findings by lower courts. *See generally* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.34 at 245 (5th ed. 1978); *cf. id.* § 5.15, at 370-73 (certiorari may be

[21] The dissenters in *Parker* disapproved the suggestion that a defendant's exercise of his fifth amendment privilege not to testify strengthened the justification for adoption of an interlocking confession doctrine. Respondent agrees with this approach. Nevertheless, if any distinctions are to be drawn, a defendant in Street's position presents the most compelling case for refusing to apply an "interlock" exception.

deemed improvidently granted when the case turns on questions of importance only to the litigants).[22]

As previously noted, the Tennessee court resolved the "interlock" issue in favor of Street on state law grounds and therefore cannot be reversed on that issue. Even upon independent examination, however, the Court should conclude that neither the harmless error nor the interlocking confession doctrine can be used to sustain Street's conviction. The same considerations support the inapplicability of both doctrines.[23]

In reliance upon Tennessee precedent, the Court of Criminal Appeals held that even if the interlock exception applied outside the joint trial setting, it did not cover the case of Street, whose alleged accomplice made him a "much more principal actor" in the crime than did his own admissions. 674 S.W.2d at 746. According to that court, where the

> confession of one non-testifying codefendant contradicts, repudiates, *or adds to material statements* in the confession of the other non-testifying codefendant, *so as to expose the latter to an increased risk of conviction* or to an increase in the degree of the offense with correspondingly greater punish-

[22] Notably, in all three cases in which this Court held that a *Bruton* error was harmless, it did not overturn the opposite findings of a lower court. *See Brown* v. *United States*, 411 U.S. 223 (1973); *Harrington* v. *California*, 395 U.S. 250 (1969); *cf. Schneble* v. *Florida*, 405 U.S. 427 (1972), *affirming* 215 So. 2d 611 (Fla. 1968) (Florida court found no error).

[23] The State urges adoption and application of the interlocking confession doctrine herein because of the remarkable similarities between the confessions. Curiously, however, the State concurrently maintains that the confessions are so dissimilar that admission of Peele's statement was necessary lest Street be allowed to perjure himself with impunity.

> ment, the latter codefendant is entitled to test the veracity of the statements in the confession of his codefendant. A denial to him of his right through the failure of his codefendant to take the stand brings the *Bruton* rule into play.

674 S.W.2d at 746, quoting *State* v. *Elliot*, 524 S.W.2d 473, 478 (Tenn. 1975) (emphasis added). Unquestionably, Peele's confession added to Street's in a way that increased the latter's risk of being convicted of murder in the first degree.

Peele's confession portrayed Street as a principal actor and as a willing participant in the killing. Street's confession, on the other hand, suggested that he was not willing to "whip" the victim. (J.A. 354) Furthermore, as noted by the Court of Criminal Appeals, Street stated that he kept telling Peele to leave but that Peele insisted on the hanging. 674 S.W.2d at 746. Street claimed not to participate in the hanging but Peele's confession indicated that Street helped place the rope around Tester's neck and also helped lift the victim off the truck's tailgate. (J.A. 302) Plainly, Peele's confession depicted Street much less favorably than Street's own contested statement. Furthermore, it added significantly to the risk that Street would be convicted because it was the most prominent evidence possessed by the State which was corroborative of Street's declarations.

Moreover, in the words of the Tennessee Court of Criminal Appeals:

> Peele's statement not only implicated the defendant, it alone could establish all essential elements of the homicide, had the jury chosen to believe defendant's confessions were in fact involuntary.

State v. *Street*, 674 S.W.2d at 747. Hence, under the Tennessee test for interlocking confessions (which this

Court should adopt if it chooses to recognize such an exception), the introduction of Street's admission did not dispense with the need to exclude Peele's more damning accusations because the latter did not "interlock" with the former.

Without Peele's confession, the State lacked the overwhelming evidence of guilt necessary for reversal on the basis of harmless error. The State's case rested primarily on Street's statements (Brief for Petitioner at 3), but this evidence was heavily contested by both the alibi witnesses and Street's own testimony. *Cf. Brown* v. *United States*, 411 U.S. 223 (1973); *Harrington* v. *California*, 395 U.S. 250 (1969) (in both cases, eyewitnesses placed the respective defendants at the scene of the crime); *see also Schneble* v. *Florida*, 405 U.S. 427 (1972) (the codefendant's statement was only mildly incriminating, corroborating some of the details of the defendant's own confession).

Street's claim is simple and compelling. *Bruton* precluded the introduction of the absent, unreliable Peele's confession incriminating Street. That confession did not interlock with Street's own admissions under Tennessee law, a circumstance that should be dispositive in Street's favor on this issue. In any event, the statements should not, in any event, be held interlocking as a federal matter if the Court elects to adopt the plurality appraoch in *Parker* v. *Randolph*, 442 U.S. 62 (1979). Lastly, by no stretch of the imagination could the error in receiving Peele's confession be deemed harmless. On the contrary, it served as the State's most powerful attack on Street's alibi defense. Its author, however, unlike Street, was immune from cross-examination.

CONCLUSION

The judgment of the Tennessee Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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